IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

JON SLINGERLEND and SONIA SLINGERLEND, husband and wife, Plaintiffs/Appellants, v. SHIRLEY CRAIG and CENTURY 21 J. PAGEL REALTY, INC., Defendants/Appellees.	2 CA-CV 2006-0200 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C-20022231

Honorable John F. Kelly, Judge

AFFIRMED

Carl M. Tootle — Tucson
Attorney for Plaintiffs/Appellants

Chandler & Udall, LLP
By Charles A. Davis — Tucson
Attorneys for Defendants/Appellees

P E L A N D E R, Chief Judge.

¶1 Appellants Jon and Sonia Slingerlend challenge the trial court's order denying their application for attorney fees against appellees Century 21 J. Pagel Realty and its real

estate agent, Shirley Craig (collectively "Century 21"). The Slingerlends contend the trial court erred in determining their cause of action did not "aris[e] out of a contract" for purposes of A.R.S. § 12-341.01(A). Finding no error, we affirm.

Background

¶2 The pertinent procedural facts are undisputed. In June 2000, the Slingerlends purchased a residence from Sonja Cahill, who was represented in the transaction by Century 21. Almost two years later, in May 2002, the Slingerlends filed this action against Cahill and Century 21, alleging negligent misrepresentation, consumer fraud, fraud, unlawful acts, and negligence based on "numerous hidden defects in the [p]roperty." The Slingerlends sought rescission of the purchase contract and also requested compensatory, punitive, and treble damages and reasonable attorney fees and costs against all defendants.

¶3 The case was assigned to compulsory arbitration. The arbitrator awarded approximately $20,000 to the Slingerlends after finding "[t]here we[re] structural defects in the[ir] . . . residence" that Cahill and Century 21 "should have been aware of and should have disclosed" to the Slingerlends. The arbitrator did not award attorney fees to any party. The Slingerlends appealed to superior court from the arbitration award and requested a jury trial.

¶4 The parties' joint pretrial statement included as "contested issues of fact and law de[e]med material" "[w]hether . . . Cahill ha[d] committed misrepresentation, breach of contract, breach of the covenant of good faith and fair dealing and/or breach of her duty to disclose known defects and past repairs," and "[w]hether . . . [Century 21 had] breached any duty of fairness to [the Slingerlends] and/or any duty to disclose information which they

knew or should have known." During trial, the trial court granted the defendants' motion for judgment as a matter of law "as to the issues of consumer fraud, breach of contract (good faith and fair dealing), and negligence." The jury ultimately found that "Cahill and [Century 21 had] acted in concert" in committing fraudulent concealment and awarded approximately $89,000 in damages to the Slingerlends.

¶5 The Slingerlends then requested an award of attorney fees, claiming that their purchase contract with Cahill provided for fees and that "attorney fees [we]re awardable against [Century 21] under A.R.S. § 12-341.01, which allows an award of fees in any contested action arising from contract." Both Cahill and Century 21 objected to the Slingerlends' fee application.[1] Following argument, the trial court ruled that the Slingerlends "[we]re not entitled to attorney[] fees pursuant to A.R.S. § 12-341.01 against [Century 21]," finding that the claim of fraudulent concealment "sounds mainly in tort, and its existence does not depend upon a breach of the contract for the sale of real estate."[2]

¶6 Approximately three months after that ruling, the parties filed a "stipulation to set aside verdict and dismiss," asking the trial court to "ent[er] . . . an Order setting aside

---

[1]While the attorney fee request was still pending, the parties filed a "notice of settlement and stipulation for partial stay," informing the court that they had "reached a settlement of th[e] matter that [had] resolve[d] all claims except [the Slingerlends'] request for an award of attorney[] fees." The parties requested the trial court to stay briefing on Century 21's post-trial motions pending the settlement agreement but proceed on the attorney fee issue.

[2]The trial court's minute entry denying the attorney fee request "against [Century 21]," made no mention of the Slingerlends' request for an award of fees against Cahill. Thus, we assume either the trial court awarded fees against Cahill pursuant to the purchase contract or the parties settled that matter. In any event, this appeal does not involve the issue of attorney fees against Cahill.

the jury's verdict as unsupported by the evidence and dismissing the case with prejudice." The parties also stated the stipulation would not "preclude [the Slingerlends] from appealing the Court's decision on [their] request for attorney[] fees as against [Century 21]." Pursuant to the stipulation, in July 2006, the trial court ordered "the jury verdict . . . set aside as unsupported by the evidence," preserved the Slingerlends' "right to appeal" the court's earlier denial of their request for attorney fees against Century 21, and "otherwise dismiss[ed] th[e] case with prejudice, each party to bear their own fees and costs." Within thirty days of that order, the Slingerlends then filed a notice of appeal "from the denial of their Application for Attorney Fees as against [Century 21]."

¶7 Based on the wording of the trial court's July 2006 order, in July 2007, this court, sua sponte, raised questions about whether the Slingerlends would be considered "successful parties" for purposes of § 12-341.01(A), whether their claim on appeal was moot, and whether the trial court could exercise subject matter jurisdiction if the case were remanded. In August, this court revested jurisdiction in the trial court, which then entered and filed on August 29 an amended order of dismissal with prejudice, finding that the Slingerlends were successful parties in this action within the meaning of § 12-341.01 and clarifying that the jury's verdict was set aside and the case dismissed with prejudice "for all purposes other than further proceedings regarding the attorney fees issue."

Jurisdiction

¶8 Without elaboration, the Slingerlends contend this court has appellate jurisdiction "pursuant to A.R.S. § 12-2101(B) and/or (C)." The question of our jurisdiction, however, is not clear cut; and we have an "independent duty to determine whether we have

jurisdiction." *Bothell v. Two Point Acres, Inc.*, 192 Ariz. 313, n.2, 965 P.2d 47, 50 n.2 (App. 1998); *see also Musa v. Adrian*, 130 Ariz. 311, 312, 636 P.2d 89, 90 (1981).

¶9 After the jury verdict but before entering any judgment, the trial court denied the Slingerlends' request for an award of attorney fees against Century 21 in an unsigned minute entry. Pursuant to the parties' stipulation, the trial court later set aside the jury's verdict and dismissed the case with prejudice, while preserving the Slingerlends' right to challenge the attorney-fee ruling on appeal. That order of dismissal with prejudice constitutes a final judgment. *See Jackson v. Pac. Inv. Co.*, 94 Ariz. 416, 417, 385 P.2d 708, 709 (1963); *Props. Inv. Enters., Ltd. v. Found. for Airborne Relief, Inc.*, 115 Ariz. 52, 54, 563 P.2d 307, 309 (App. 1977); *cf. Osuna v. Wal-Mart Stores, Inc.*, 214 Ariz. 286, ¶¶ 9-11, 151 P.3d 1267, 1270-71 (App. 2007). After entering that judgment, and after the Slingerlends filed their notice of appeal, the trial court entered a signed order again denying the Slingerlends' attorney fee request. And recently, after we revested jurisdiction in the trial court, that court entered an amended order of dismissal with prejudice.

¶10 That the Slingerlends appealed from an unsigned minute entry that preceded the entry of final judgment—and thus appealed prematurely—does not divest this court of jurisdiction. *See Barassi v. Matison*, 130 Ariz. 418, 421, 636 P.2d 1200, 1203 (1981); *Schwab v. Ames Constr.*, 207 Ariz. 56, ¶ 9, 83 P.3d 56, 58 (App. 2004). Nonetheless, this court must still have a substantive, statutory basis for exercising its subject matter jurisdiction. *See* A.R.S. § 12-2101(A); *Tucson Telco Fed. Credit Union v. Bowser*, 6 Ariz. App. 10, 11, 429 P.2d 502, 503 (1967). Although the trial court's final, signed order denying the Slingerlends' attorney fee request was issued after the court's entry of a final

judgment, it does not clearly qualify as a "special order made after final judgment" for purposes of § 12-2101(C). To so qualify, the "special order after judgment must raise different issues than those that would be raised by appealing the underlying judgment" and "must affect the underlying judgment, relate to its enforcement, or stay its execution." *In re Marriage of Dorman*, 198 Ariz. 298, ¶ 3, 9 P.3d 329, 331 (App. 2000); *see also Arvizu v. Fernandez*,183 Ariz. 224, 226-27, 902 P.2d 830, 832-33 (App. 1995). We have found no authority for the proposition that a post-judgment order awarding or denying attorney fees fulfills those requirements.

¶11 Section 12-2101(B), which the Slingerlends also cite, permits an appeal "[f]rom a final judgment entered in an action." In accordance with the 1999 amendments to the civil procedure rules, the trial court did "resolve[] and . . . address[]" the Slingerlends' claims for attorney fees before entering a final judgment. *See* Ariz. R. Civ. P. 58(g), 16 A.R.S., Pt. 2. Had the Slingerlends appealed from the final judgment dismissing the case with prejudice, this court could have addressed any related or prior trial court "orders and rulings assigned as error." A.R.S. § 12-2102(A); *see also Plattner v. State Farm Mut. Auto. Ins. Co.*, 168 Ariz. 311, 318, 812 P.2d 1129, 1136 (App. 1991) (agreeing that "appeal from [a] final judgment necessarily includes . . . non-appealable minute entries").

¶12 As noted in ¶ 6 above, although the Slingerlends timely appealed within thirty days of the trial court's judgment that dismissed the case with prejudice, they noticed their appeal only "from the denial of their Application for Attorney Fees as against [Century 21]," without appealing from the judgment itself. Nonetheless, the notice of appeal specifically referred to the trial court's judgment and expressly appealed the attorney fee issue "pursuant

to the parties' stipulation" and that resulting judgment. And, as noted in ¶ 7 above, after we revested jurisdiction in the trial court, it recently entered an amended order clarifying that the parties and the court intended to preserve for appeal the earlier denial of the Slingerlends' request for attorney fees.

¶13 In short, we find appellate jurisdiction exists here, albeit with some effort, when the notice of appeal "was neither misleading nor prejudicial" to Century 21. *McKillip v. Smitty's Super Valu, Inc.*, 190 Ariz. 61, 63, 945 P.2d 372, 374 (App. 1997). Under these circumstances, this court can and does "overlook [the] technical defect" in the notice of appeal and may "proceed" to the merits. *Id*. at 63-64, 945 P.2d at 374-75; *see also Hill v. City of Phoenix*, 193 Ariz. 570, ¶ 10, 975 P.2d 700, 702 (1999); *Schwab*, 207 Ariz. 56, ¶ 11, 83 P.3d at 59; *cf. Wenk v. Horizon Moving & Storage Co.*, 131 Ariz. 131, 132, 639 P.2d 321, 322 (1982) (supreme court addressed trial court's ruling denying award of attorney fees under § 12-341.01(A) even though "[n]either party . . . appealed the trial court's findings of fact and conclusions of law").

Discussion

¶14 The Slingerlends argue the trial court "erred in finding that A.R.S. § 12-341.01 does not allow an award of attorney fees incurred in bringing a just claim against a real estate agent who acted in concert with the seller to conceal material defects in the residence sold." "The application of A.R.S. § 12-341.01(A) to [the Slingerlends'] claims is a question of statutory interpretation, which we review *de novo*." *Ramsey Air Meds, L.L.C. v. Cutter Aviation, Inc.*, 198 Ariz. 10, ¶ 12, 6 P.3d 315, 318 (App. 2000).

¶15 Section 12-341.01(A) provides: "In any contested action arising out of a contract, express or implied, the court may award the successful party reasonable attorney fees." The trial court has now clarified in its amended order, filed August 29, 2007, that the Slingerlends are successful parties for purposes of § 12-341.01(A), and Century 21 does not challenge that fact. "The statute permits recovery for a non-contract action if that action could not exist but for the breach of contract." *Chaurasia v. Gen. Motors Corp.*, 212 Ariz. 18, ¶ 24, 126 P.3d 165, 173 (App. 2006); *see also Sparks v. Republic Nat'l Life Ins. Co.*, 132 Ariz. 529, 543, 647 P.2d 1127, 1141 (1982). Although the jury ultimately found that Century 21 was liable for the tort of fraudulent concealment, the Slingerlends contend "[t]he fundamental nature of this matter [wa]s . . . contract, with the listing agreement, purchase contract and employment contract [between Century 21 and Cahill] being central to the issues created."

¶16 "The existence of a contract that merely puts the parties within tortious striking range of each other does not convert ensuing torts into contract claims." *Ramsey*, 198 Ariz. 10, ¶ 27, 6 P.3d at 320. "Rather, a tort claim will 'arise out of a contract' only when the tort could not exist 'but for' the breach or avoidance of contract." *Id.* In contrast, when a duty is imposed by law because of the relationship between the parties, "that claim sounds fundamentally in tort, not contract." *Id.* Thus, when "professionals owe special duties to their clients, . . . breaches of those duties are generally recognized as torts." *Barmat v. John & Jane Doe Partners A-D*, 155 Ariz. 519, 523, 747 P.2d 1218, 1222 (1987); *cf. Desilva v. Baker*, 208 Ariz. 597, ¶ 32, 96 P.3d 1084, 1092 (App. 2004) ("A malpractice action may be founded on contract if 'the duty breached is *not* imposed by law, but is a duty created by

the contractual relationship, and would not exist "but for" the contract.'"), *quoting Resolution Trust Corp. v. W. Tech. Inc.*, 179 Ariz. 195, 199, 877 P.2d 294, 298 (App. 1994), *quoting Barmat*, 155 Ariz. at 523, 747 P.2d at 1222 (emphasis added).

¶17 Pursuant to administrative regulation, a licensed real estate agent must "deal fairly with all other parties to a transaction" and must "disclose in writing to all other parties any information the [agent] possesses that materially or adversely affects the consideration to be paid by any party to the transaction." Ariz. Admin. Code R4-28-1101(A)-(B); *see also Haldiman v. Gosnell Dev. Corp.*, 155 Ariz. 585, 591, 748 P.2d 1209, 1215 (App. 1988) (real estate agent's duty of full and frank disclosure "d[oes] not stem from the real estate contract itself"). Thus, the jury's finding that Century 21 had breached those duties in committing fraudulent concealment was based on a legal duty separate and apart from any contractual relationship between the parties. In fact, the instructions given to the jury addressed "[a] seller's real estate agent['s] . . . duty to disclose to the buyers," without mentioning any contract between the parties.

¶18 Notwithstanding the aforementioned duties imposed by law, the Slingerlends contend "the test is whether [Century 21's] duties would exist but for the contractual promises involved." They point to the "express reference" in the listing agreement between Century 21 and Cahill of duties Century 21 owed to "both the Seller and the Buyer" to show that its duties arose out of contract. Although "[a] claim may still arise 'out of a contract' for professional services when the contract imposes *additional* duties beyond those implied by law," *Ramsey*, 198 Ariz. 10, ¶ 26, 6 P.3d at 320, the duties set forth in the contract between Century 21 and Cahill are identical to those found in the administrative

code. Accordingly, the listing agreement did not impose any duties on Century 21 beyond those already imposed by law. Absent any additional or distinct duties created by a contract, the Slingerlends' fraudulent concealment claim does not arise out of contract.

¶19 The Slingerlends lastly argue that, "[w]ithout the listing agreement and the agreement to purchase the residence, there would be no relationship whatever between [Century 21] and Slingerlends other than that of strangers." But, "while a contractual relationship may give rise to a duty to perform in accordance with a certain standard of care, this legally imposed duty exists separate and apart from the contract giving rise to the duty." *Lewin v. Miller Wagner & Co.*, 151 Ariz. 29, 36, 725 P.2d 736, 743 (App. 1986). And, "[t]he failure to comply with this standard of care results in a breach of the legal duty imposed and is not an action 'arising out of contract' under A.R.S. § 12-341.01(A)." *Id.* Thus, that a contract brought these parties into a relationship does not convert this action into one "arising out of contract." *Id*.

¶20 Further, as noted earlier, Century 21 was obligated pursuant to administrative regulation to "disclose in writing to all other parties any information the [agent] possesses that materially or adversely affects the consideration to be paid by any party to the transaction." Ariz. Admin. Code R4-28-1101(A). Accordingly, Century 21 arguably would have owed that duty to any person who made an offer on the property, not just to the party who ultimately contracts to buy the property. In sum, because the duties owed by Century 21 to the Slingerlends arose out of law and were merely repeated verbatim in the Century 21-Cahill listing agreement, the trial court did not err in denying the Slingerlends' application for attorney fees against Century 21.

Disposition

¶21 The trial court's order denying the Slingerlends' application for an award of fees against Century 21 is affirmed. In our discretion, we deny Century 21's request for an award of attorney fees on appeal made pursuant to Rule 25, Ariz. R. Civ. App. P., 17B A.R.S., and § 12-341.01. Because the Slingerlends are not the successful parties on appeal, we likewise deny their request for attorney fees on appeal made pursuant to § 12-341.01.

_____
JOHN PELANDER, Chief Judge

CONCURRING:

_____
JOSEPH W. HOWARD, Presiding Judge

_____
J. WILLIAM BRAMMER, JR., Judge